UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1991/50
22 July 1991

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-third session
Item 10 (a) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Application of international standards concerning the human rights of detained juveniles

Note by the Special Rapporteur

The Special Rapporteur wishes to draw the attention of the Sub-Commission to the attached document which she has received from Defence for Children International and which relates to her mandate.

GE.91-12476/3456B

READEX
FICHE

INTRODUCTION

1. By its resolution 1981/31 of 1 September 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities requested that a study be prepared on "the application of international standards concerning the human rights of detained juveniles, in particular the separation of juvenile and adult offenders in penal institutions, detention pending trial, least possible use of institutionalization and the objectives of institutional treatment".

2. Defence for Children International (DCI) subsequently received a letter from the Under-Secretary-General for Human Rights containing a questionnaire prepared in connection with this study and inviting it to submit relevant "information and comments". The questionnaire was circulated by DCI to its national sections and to other interested NGOs around the world, and a comprehensive summary of the information received has been submitted to the Special Rapporteur through the United Nations Centre for Human Rights. This information concerns 15 countries: Bangladesh, Bolivia, Brazil, Canada, Chile, Ecuador, India, Japan, Mexico, Pakistan, the Philippines, Senegal, Thailand, the United Kingdom and the United States.

3. The present document contains DCI's comments concerning the application of international standards concerning the human rights of detained juveniles. Part I provides an overview of the different types of juvenile justice systems, or approaches to juvenile justice, described in the responses received and other available information; Part II analyses the compatibility of certain laws and practices with international standards concerning the human rights of juveniles deprived of liberty and Part III contains conclusions and recommendations concerning the future work of the Special Rapporteur.

I. OVERVIEW OF EXISTING JUVENILE JUSTICE SYSTEMS

A. The nature of the competent bodies

4. In order to evaluate how well a given system complies with international standards concerning human rights of juveniles deprived of liberty, it would be insufficient to look at isolated facts or indicators. Given the enormous differences in the way juvenile justice functions in different societies, and the vastly different social, economic and criminological challenges faced by Governments responsible for the functioning of such systems, such information must be evaluated in the proper context.

5. The nature of the institutions which have primary responsibility for responding to juveniles in conflict with the law and, in particular, the power to deprive them of liberty, is part of this context. Four basic situations can be discerned: (a) the absence of a juvenile justice system, (b) existence of a system of juvenile courts, (c) existence of a juvenile justice system which is administrative rather than judicial and (d) existence of a mixed or hybrid system which is partly administrative and partly judicial. Of equal importance is the conceptual underpinning of the system, that is, the declared purposes of the system and the basic principles governing its operation. Here

it is useful to distinguish between three types of system: those which are non-penal, those which are penal in nature, and those which are inspired by what has been called the "juvenile due process" model.

6. Finland and Pakistan provide examples of countries which do not have juvenile justice systems, or at least lack the key component, that is, some kind of specialized tribunal. Finland does have special legislation, the Juvenile Delinquent Act of 1940. The philosophy underlying the lack of a juvenile justice system in Finland, and apparently in other Nordic countries as well, includes heavy emphasis on diversion, that is, avoiding formal adjudication in all but the most serious cases, and an unusually high minimum age of criminal responsibility, 15 years. According to the theory, reliance on diversion has reached the point where the need for a juvenile justice system has disappeared, or at least where the number of juvenile offenders brought before the courts for adjudication is so small that the cost of maintaining a separate system for them would be disproportionate. Consequently, juveniles not considered suitable candidates for diversion are tried before ordinary criminal courts and serve sentences in ordinary adult prisons, although the sentence they receive is less than that applicable to an adult and they receive some special consideration while in prison.

7. In Pakistan all juveniles accused of an offence are tried by ordinary criminal courts. There is no national legislation concerning juvenile offenders, although some provinces have adopted legislation on some aspects of juvenile justice, and the system of residential facilities for juvenile offenders is fragmentary. Here, however, the lack of a functioning juvenile justice system does not reflect the success of prevention and diversion programmes in responding to the problem of juvenile law-breaking but rather long-standing neglect of the problem of juvenile offenders and the lack of resources.

8. Cuba and Mexico provide examples of non-judicial juvenile justice systems. In Mexico juveniles accused of an offence are adjudicated by "Councils for the Protection of Juvenile Offenders". Such councils form part of the Ministry of the Interior. They are presided by a lawyer, but the other members are medical doctors and social workers or educators. In Cuba the age of majority for the purpose of the criminal law is 16, but juveniles below that age who commit offences may be confined to closed special educational facilities by decisions of councils forming part of the Ministry of Education. In both cases the underlying philosophy is clearly anti-penal. Courts are considered unnecessary because the purpose of the system is not to punish the juvenile but rather to help; by the same logic a juvenile can be confined to an institution with juvenile offenders even if no offence was committed, on the basis of the need for treatment. Belgium shares many of the features of this system. Although the Belgian law is applied by juvenile courts rather than administrative bodies, the reasons justifying adjudication are not defined in terms of violation of the law but rather behavioural problems.

9. Most countries do have specialized courts for the adjudication of juveniles accused of an offence, according to the information available. However, the creation of a juvenile court system does not necessarily mean that the right of all accused juveniles to special treatment will be

effectively protected. In some countries the jurisdiction of juvenile courts is limited to one or more of the largest population centres. In some instances this may reflect the small "demand" for specialized juvenile courts in other areas (i.e. the small number of juveniles charged with serious offences in rural areas) while in others it is due to the lack of sufficient resources or interest to complete implementation of the juvenile justice system. In some countries, such as Brazil and India, federal legislation provides the legal framework for juvenile courts but leaves the responsibility for establishing and financing juvenile courts and related services to the States or territories, a situation which may contribute to the lack of implementation of legislation intended to protect the rights of the child.

10. Many countries do not have a single unified approach to juvenile justice but rather a two-tier system. Typically juvenile courts have competence over older juveniles accused of an offence in such systems, while social agencies handle cases of younger juveniles having manifested similar conduct. In Japan, for example, the Juvenile Division of the Family Court handles cases of juvenile offenders between the ages of 14 and 20 while cases involving juveniles between the ages of 10 and 14 are normally handled by "Child Guidance Centres" under the Child Welfare Law. In Bolivia juvenile courts adjudicate cases of juveniles under the age of 16 accused of an offence, but the child welfare system is responsible for their rehabilitation; while juveniles between the ages of 16 and 21 are tried by ordinary criminal courts and serve sentences in ordinary prisons, although sentences are reduced and are served in separate wings of ordinary prisons. Thailand's two-tier system distinguishes between those between the ages of 7 to 14 and those between 14 and the age of majority, which is 18 years. Juvenile courts have competence over both groups but only those 14 or older can be sentenced to confinement in a rehabilitation centre (with some exceptions).

11. Still more variations exist but the foregoing may suffice to illustrate the four basic types of approach to juvenile justice and their diversity.

B. The underlying objectives and approach to juveniles in conflict with the law

12. Juvenile justice systems may also be distinguished by the theoretical constructs underlying the response to juveniles who come into conflict with the law. Some systems are clearly based on a rejection of the basic principles underlying penal law. In such systems the "needs" of the juvenile are considered the critical factor, and the offence is relevant basically only as evidence of the socio-psycho-pedagogical "needs" of the offender. Orders of confinement are often indeterminate, and juveniles may typically be confined in an institution on the basis of the need for treatment (or rehabilitation or protection) whether or not there is clear evidence that he or she has committed an offence. Such systems are more often administered by non-judicial administrative bodies, as in the case of Cuba and Mexico, but Belgium provides a contrary example. The popularity of this type of system has waned in recent decades due to the criticism that in practice they allow juveniles to be treated as criminals without the benefits of the rights afforded accused persons under the penal law.

13. The opposite extreme is the strictly penal approach, where the juvenile accused of an offence is adjudicated like an adult offender except that the sentence is reduced because of his or her age. In Thailand, for example, courts have discretion to sentence juvenile offenders between the ages of 14 and 17 under the penal code, with reduction by one half of the sentence applicable to an adult. In Pakistan convicted juveniles may receive the same sentences as an adult, any reduction due to the age of the offender being at the discretion of the trial judge.

14. Between these two extremes is the "juvenile due process" approach. The main features which distinguish this approach are that the response of the authority is based in the first instance on a finding of responsibility for the commission of an offence (i.e. the presentation of sufficient proof of the commission of an act punishable under law, absence of justification, etc.) while determination of the appropriate sentence is based on rules or standards designed specifically for juveniles in conflict with the law. This approach seems to be prevalent and is clearly becoming increasingly common.

C. The minimum age for entry into the system

15. In most countries not all juveniles who have committed an offence can be brought before a juvenile court or other competent body, but only those who are old enough to understand and appreciate the significance of their behaviour. The legislation of most countries limits the discretion of the courts or other competent bodies in this regard by establishing a lower age limit below which they have no competence to hold a juvenile responsible for his or her conduct.

16. In many countries whose legislation was influenced by the Common Law, there are in effect two age limits for this purpose: a binding presumption that children below the age of seven do not have the level of moral and mental development which would justify adjudication, and a rebuttable presumption that children under some higher age limit have not attained the requisite level of moral and mental development. In Bangladesh, India and Singapore the absolute minimum age limit for adjudication is 7 years, and there is a presumption that juveniles between the ages of 7 and 12 are not mature enough to be adjudicated. Japan and Malaysia adopt a similar approach, but both age limits are higher. In both countries the absolute minimum age limit is fixed at 10 years, and juveniles between the ages of 10 and 14 are presumed not to be mature enough to be adjudicated.

17. In a few countries, including Chile, Costa Rica and Spain, the legislation provides no limits to discretion of the competent authorities in this regard. In some federal States the lower age limit varies from one jurisdiction to another. In both Mexico and the United States of America the legislation of some States establishes no lower age limit, and such limits as are established by State legislation range from 6 to 12 years.

D. The upper age limit for adjudication as a juvenile

18. The prevailing tendency in international human rights law is to use the age of 18 as the main point of reference for distinguishing between those who are entitled to special protection because of their youth for purposes of the

criminal law. The legislation of many countries does use the age of 18 to distinguish between those who are fully responsible for criminal offences and those who are entitled to more favourable treatment and special protection. In a few States the age of majority is even higher.

19. Nevertheless, in a significant number of countries persons under the age of 18 are treated as adults for purposes of the criminal law. In nearly all such countries the age of majority is established at 16 or 17 years of age. According to the information available only two countries establish a lower age of criminal majority, at age 15. In some countries, however, such as Pakistan, the limit between minority and adulthood for purposes of certain crimes is determined by physical maturity rather than chronological age, and any person having reached the age of puberty is punishable as an adult. Similarly, a few countries have a different age of criminal majority for males and juveniles. In India and Pakistan, girls who commit an offence are punishable as adults at age 16, two years earlier than boys.

E. Exclusion of juveniles from the juvenile justice system

20. The legislation of a number of countries also allows persons under the general age of criminal majority to be tried as adults in certain circumstances. In some countries this possibility is restricted to a narrow age group of older juveniles, while in other cases it may be applied to any juvenile offender, or to juvenile offenders far younger than the age of majority.

21. In some countries a juvenile can only be tried as an adult on the basis of a study of his or her mental and psychological qualities, while in others factors such as the nature of the offence or the prior record of the accused may cause a juvenile to be tried as an adult. In the United States, for example, the Supreme Court in 1988 upheld the constitutionality of State legislation allowing 16- and 17-year-olds to be tried as adults and sentenced to death as long as there is an individual determination that the particular offender deserved to be tried as an adult. Canada, Chile, Japan, Madagascar and the United Kingdom also allow juveniles above a certain age to be tried as adults after an individualized determination. Canada gives courts the widest discretion in this regard, allowing juveniles 14 and older to be tried as adults. Of the countries mentioned only the United States allows juveniles tried as adults to be sentenced to death, but in Canada and Japan such juveniles may be sentenced to life imprisonment and in the United Kingdom they may be sentenced to an indefinite term of imprisonment with no maximum.

22. Several countries indicated that juveniles accused of committing a crime jointly with an adult are tried in adult court under ordinary procedures. In Yugoslavia juveniles accused of committing a crime jointly with an adult may be tried together with the adult co-defendant in criminal court only if joint trial is considered indispensable for clarifying the facts, and that the law and procedures applicable to juveniles must be applied by such courts when juveniles are tried jointly with an adult co-defendant. However, the legislation of other countries that allow the trial of juveniles together with adult co-defendants apparently does not require that there be imperative reasons for joint trial, nor require such courts to apply law and procedures intended for juvenile offenders.

23. Thailand has a unique legal provision to the effect that married juveniles charged with an offence are tried as adults. Trinidad and Tobago also has an unusual provision which allows juveniles between the ages of 14 and 16 to waive trial by juvenile court if they wish the benefit of trial by jury, which is recognized as a fundamental right of accused persons under the Common Law.

24. In some countries offences that are within the competence of special courts rather than ordinary criminal courts are excluded from the competence of juvenile courts, when the offender is a juvenile. Paradoxically, this seems to apply to either exceptionally serious offences, or to the least serious offences. In the Philippines, for example, juveniles accused of crimes within the exclusive competence of military courts are tried by military courts, and in Malaysia juveniles accused of offences punishable under the Internal Security Act, such as possession of firearms, ammunition or explosives within designated areas, are tried under the Act the same as adults. In Northern Ireland certain crimes presumed to be terrorist-related are likewise tried by special courts which have competence over all persons over the age of 10 accused of such offences.

25. In France, juveniles accused of traffic offences and using public transport without payment are tried by police courts, rather than juvenile courts. While offences of this kind are excluded from the competence of criminal courts because the sentence is relatively light, even light sentences may have important consequences for a juvenile offender. Moreover, the limited competence of such courts in terms of the length of the sentences which may be imposed is no guarantee against the risk of unwarranted or prolonged detention prior to trial. In some countries, such as Bolivia and India, detention of juveniles for such minor offences as using public transport without payment is a common cause of prolonged detention without trial in police facilities, often in very harmful conditions.

II. COMPATIBILITY OF LEGISLATION AND PRACTICES REPORTED WITH INTERNATIONAL STANDARDS

A. The trial of juvenile offenders as adults and the child's right to special protection

26. The paramount right of the child under international human rights law is "the right to such measures of protection as are required by his [sic] status as a minor" (International Covenant on Civil and Political Rights, art. 24(1)). A juvenile suspected or accused of having committed an offence has the right, in addition to the due process rights which every person accused of an offence has, to have the case handled under procedures that "will take account of their age and the desirability of promoting their rehabilitation" (Ibid., art. 14(4)). International human rights treaties do not further specify how the procedures applicable to juvenile offenders should be different from those applicable to adults, except to imply that they should be confidential (Ibid., art. 14(1)).

27. The Beijing Rules address this question in some detail. According to these Rules the juvenile has a right to proceedings in which an atmosphere of understanding prevails, in which the well-being of the juvenile is the guiding

factor and at which the parents are present, unless this would be incompatible with the interests of the child (rules 14.2, 17.1(d) and 15.2). Procedures should not be rigid, it should be possible to "divert" cases from the courts to community-based assistance or supervision programmes before adjudication and to discontinue proceedings at any stage if circumstances which suggest that formal adjudication is unnecessary come to light (rules 11 and 17.4). Where a sentence is imposed it should be based largely on a prior "social inquiry" into the circumstances of the offender. In general the competent judicial (or other) authority should have considerable discretion and should be "specially qualified or trained to exercise it judiciously" (rules 16 and 6). Finally, the principles governing the sentences imposed on juvenile offenders should be specifically adapted to their age and status (see below).

28. The American Convention on Human Rights, in force in some 20 States, provides that juvenile offenders have a right to be tried by a "specialized tribunal" (art. 5.5). Other international human rights treaties leave Governments discretion as to whether or not the juveniles' right to such special protection can be effectively protected while allowing them to be tried by ordinary criminal courts under special procedures.

29. In some countries or regions, juvenile crime rates are said to be so low, or diversion programmes so successful, that the number of juveniles brought before the courts is too small to warrant the creation of specialized juvenile courts. This would certainly be a positive, hopeful development which merits closer study. In particular, it would be useful for the Special Rapporteur to obtain more information on the experience of such countries, both in order to identify the factors and policies which have contributred to the reduction of the number of juveniles brought before the courts and to evaluate the measures taken to protect the rights of those juveniles who are tried by criminal courts and sentenced to adult prisons.

30. The creation of specialized juvenile courts does not per se guarantee respect for the rights of juveniles who come into conflict with the law. Indeed, there is at present a strong tendency in a number of countries to revise legislation in order to eliminate the antiquated approach prevailing in some juvenile courts which tends to violate such basic human rights as the presumption of innocence, the right to a defence and the proportionality of the sentence. Nevertheless, in general the creation of juvenile courts constitutes a valuable step towards effective protection of the right of juveniles accused of an offence to be treated in accordance with the basic right of every child to "the special measures of protection as his age and status require".

31. Two problems regarding compliance with this right to special protection deserve special attention. First, where specialized courts do not exist, efforts to ensure that the procedures are genuinely different from those applied in criminal cases are often insufficient. Juvenile proceedings in ordinary courts are usually confidential, pre-sentencing reports may be available (as they are in ordinary criminal cases in many jurisdictions) and some countries, still a minority, apparently make a serious effort to divert juvenile offenders out of the judicial into the social sphere. But the

information provided by Governments in such countries makes little mention of the other basic principles which should govern juvenile proceedings, such as recognition of the well-being of the juvenile as the guiding factor in the proceedings, creation of an atmosphere of understanding, flexibility of procedures, the possibility of discontinuing proceedings and the other principles set forth in The Beijing Rules. Non-governmental organizations in several such countries point to the judicial ignorance of the basic principles of juvenile justice and relevant legislation as one of the main causes of violations of the basic human rights of juveniles tried by ordinary courts.

32. The second problem concerns legal provisions which deny certain juveniles the right to trial by juvenile courts or under procedures designed for juvenile offenders. In some legal systems, including those of Latin America, Eastern Europe and most of Africa, this practice is almost unknown, but it is relatively frequent in common law jurisdictions.

33. At first sight, international human rights law concerning children does not allow for exceptions of this kind, i.e. legislation which allows certain juveniles to be deprived of the advantages which attach to their legal status as minors, or exempt them from the right of every child to "special protection". However, despite a growing tendency to recognize the age of 18 as the main point of reference for determining majority for purposes of international human rights law, at the present stage of development of such law, States still enjoy a margin of discretion in establishing the age of majority. This being so, if a State has discretion to establish the age of majority at 16 years, it might seem incongruous to suggest that international law does not permit establishing a higher age of majority, such as 18, while providing that more mature 17-year-olds can be considered as adults for purposes of criminal responsibility. This is a complex issue which might perhaps be more appropriately studied at some future time by a body like the Committee on the Rights of the Child.

34. Even if States might enjoy some discretion in this regard, however, it is evident that such discretion must be sharply limited to avoid rendering the right of the accused juvenile to special procedures and protection meaningless. The legislation of some countries is not designed to identify individuals who are mature enough to deserve to be treated as adults, but rather to exclude certain categories of offenders under the age of majority from enjoyment of some (or all) of the rights to which juvenile offenders are entitled. Examples include legislation which requires juveniles accused of certain offences or who are recidivists to be tried as adults independently of factors such as their "mental age" or the circumstances surrounding the commission of an offence. In effect legislation of this kind allows some juveniles to be deprived arbitrarily of the measures of protection to which juveniles are entitled.

35. Similarly, while individuals mature at different rates there are limits to the range of disparity. While a juvenile one or perhaps even two years under the age of majority might possibly have the maturity of an adult, it stretches the imagination to suggest that some 14- or 15-year-olds might have the mental and emotional maturity of an adult. A minority opinion of the United States Supreme Court provides valuable insight into this issue. In a

decision upholding the application of the death penalty to 16- and 17-year-olds in the United States, a minority opinion by four dissenting members of the Court cited expert opinion that:

> In so far as 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact "a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s".

36. Referring to a scientific study of juvenile offenders between the ages of 15 and 17 which concluded that the average moral maturity level of the group was well below that of average middle-class 10- to 12-year-olds, the opinion concluded that "Juvenile delinquents ... will typically be among those persons for whom society's presumption of capacity for mature judgement at 18 is much too generous".

37. The opinion also made an important observation about the way such legislation functions in practice:

> Immaturity ... does not guarantee that a minor will not be transferred for trial in the adult court system. Rather, the most important considerations are the seriousness of the offence, the extent of prior delinquency, and the response to prior treatment within the juvenile system. Psychological, intellectual and other personal characteristics of juvenile offenders receive little attention at the transfer stage, and cannot account for differences between those transferred and those who remain in the juvenile court system.

38. Information from other countries confirms that where the law allows juveniles to be tried as adults, even where there is an individualized determination, there is a strong danger that the decision will be based on factors which have no direct relationship to the maturity of the individual, including the nature and notoriety of the crime itself and the pressure of public opinion. Legislation which allows persons even younger than 16 or 17 to be tried as adults encourages even more the risk of arbitrary denial of the fundamental right of every juvenile accused of an offence to be treated pursuant to procedures which take into account their age and legal status.

B. Detention of juveniles pending trial

39. The International Covenant on Civil and Political Rights provides that "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial ..." (art. 9(3)). This provision is applicable to all persons regardless of age. In so far as children are concerned, the Convention on the Rights of the Child has no provisions specifically concerning detention prior to trial, but recognizes the general principle that any deprivation of liberty, including "arrest, detention or imprisonment ... shall be ... used only as a measure of last resort and for the shortest appropriate period of time" (art. 37(b)). This principle is derived from The Beijing Rules, which

further indicate the kinds of alternatives to detention which should be available in order to facilitate compliance with the principle that detention should be the last resort (rules 13.1 and 13.2).

40. Few countries have adequate legal safeguards against the unwarranted detention of accused juveniles prior to trial. In only one or two countries, such as Austria and Brazil, is the principle that detention of accused juveniles should be a last resort incorporated expressly into national law, and in many countries the legal criteria governing detention prior to trial are identical for juveniles and adults.

41. Although the general principle that detention prior to trial should be exceptional applies equally to juveniles and adults, this does not imply that the same legal criteria should be used in determining whether or not a detention of a juvenile is necessary. Deprivation of liberty generally has more serious consequences on the rights of the juvenile, because it involves separation of the child from the family, which has the function of caring for and protecting the child, and because the child is more vulnerable to the types of violence, corruption and abuse which jails and other detention centres tend to foster. Consequently, the interests of the individual, which must be balanced against those of the State, are of a different order when the individual is a juvenile.

42. In addition, the child is not an autonomous member of the society. The factors which should influence the determination of whether or not the child can safely be released prior to adjudication are therefore different, or at least should be evaluated in a different way, than those which determine whether or not an adult should be released. Since the family is the natural place of a child in society the cohesiveness of the family should be a sufficient guarantee for the release of the large majority of accused juveniles. Employment or ability to pay a financial guarantee, often decisive in determining the release of an adult, have less relevance for an offender who is not economically independent. If the child accused of an offence is the victim of a dysfunctional family environment, as is often the case, every effort should be made to ensure that he or she is not made to pay the consequences of this situation by ensuring access to services intended to strengthen the family's ability to provide supervision and support, or to other community-based non-custodial programmes. In order to ensure that decisions concerning the detention of children prior to adjudication are made according to appropriate criteria, national law should incorporate provisions based on the principle that detention shall be a last resort, similar to those incorporated into the exemplary Brazilian and Austrian legislation.

43. The legislation of some countries not only fails to recognize this principle, but creates obstacles to compliance with it. Two situations are of particular concern. The legislation of some countries classifies certain crimes as "unbailable", meaning that persons accused of such offences may not be released prior to trial regardless of the circumstances. This type of provision is clearly incompatible with the principle that juveniles should only be detained as a last resort, because all consideration of the actual need for detention is excluded. It is particularly inappropriate because the

most serious crimes committed by juveniles, such as homicide, are often committed in extenuating circumstances and there is little risk of repeating the offence.

44. Legislation which requires payment of bail or some form of financial guarantee is also incompatible with the principle that juveniles should only be detained as a last resort. International human rights law restricts the right of juveniles to work, and in many parts of the world where they do work despite international standards they work in conditions approximating slavery. In many, if not most countries around the world, juveniles accused of offences tend to come from the poorest sectors of the society. Many are street children who have fled a family in which they were abused or exploited, or children who live in a family where they suffer neglect. It is therefore essential that the willingness or ability to pay bail should not be the main factor in determining whether or not an accused juvenile may be released prior to adjudication. Legislation establishing payment of bail as the main criteria for release is clearly incompatible with the principle that detention should be the last resort.

C. The least possible use of institutionalization and the objectives of institutional treatment

45. The International Covenant on Civil and Political Rights provides, in a provision applicable to all prisoners, that their "reformation and social rehabilitation" should be the "essential aim" of the correctional system (art. 10.3). In addition, the provision which recognizes the right of accused juveniles to special procedures provides that such procedures shall take into account the "desirability of promoting their rehabilitation" (art. 14.6).

46. The Convention on the Rights of the Child provides, as indicated above, that no child shall be deprived of liberty, whether by arrest, detention prior to trial or "imprisonment", except as a last resort and for the shortest appropriate period of time (art. 37(b)). This provision of the Convention is based on The Beijing Rules, which declare that "The placement of a child in an institution shall always be a disposition of last resort and for the minimum necessary period" (rule 19). In addition, the provision of the Convention concerning the sentencing of juvenile offenders provides that "A variety of dispositions ... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence" (art. 40.4).

47. The provisions of The Beijing Rules concerning sentences are considerably more detailed. In addition to the rule announcing the principle of "last resort", now incorporated into the Convention on the Rights of the Child, rule 18, like article 40.4 of the Convention, indicates the types of alternative dispositions which should be available to help make compliance with the principle of last resort possible. The most detailed provisions are found in rule 17, which concerns principles which should govern selection of the appropriate disposition in individual cases. Rule 17.1(a) provides that the disposition imposed "shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and the needs of the juvenile as well as the needs of the society"; paragraph (b)

provides that dispositions involving any restriction of liberty "shall be limited to the possible minimum"; paragraph (d), like article 40.4 of the Convention, provides that "The well-being of the juvenile shall be the guiding factor in the consideration of his or her case"; and paragraph (c) provides that juveniles shall not be deprived of liberty unless convicted of "a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response".

48. These standards, as the commentary to rule 17 indicates, reflect "unresolved conflicts of a philosophical nature" concerning the relative importance and legitimacy in sentencing policy of potentially conflicting social and legal objectives. The same could be said of article 37 of the Convention on the Rights of the Child, which suffers from an apparent contradiction between paragraph (a), which prohibits life imprisonment "without possibility of release", and paragraph (b), which prohibits the imprisonment of juveniles for longer than the "shortest appropriate period of time". Consequently, prior to evaluating compliance with international standards concerning the institutionalization of juvenile offenders, it may be useful to clarify the meaning and implications of these standards, in particular as concerns the relative weight to be accorded to the interests of the offender and to those of society.

49. The standards cited above do not imply that the well-being or rehabilitation of the offender is the sole legitimate consideration in sentencing a juvenile offender. Both The Beijing Rules and the Convention on the Rights of the Child allow other objectives, such as individual or general deterrence, to be taken into account if this is the policy of a given State. However, the repeated references to the well-being of the juvenile, to limiting institutionalization to the shortest possible or appropriate period, and to rehabilitation as the essential aim of institutional treatment, taken together, clearly suggest that factors such as deterrence should not be the dominant considerations in sentencing juvenile offenders. In other words, deterrence may be taken into account in order to impose a sentence somewhat longer than one based exclusively on the need for rehabilitation, on condition that the resulting sentence would be so long as to be counter-productive for rehabilitation or prejudicial to the well-being of the juvenile.

50. The legislation of some countries provides for sentences in which the need for rehabilitation is clearly not a primary consideration, and which are so long as to be necessarily prejudicial to the well-being and healthy development of the sentenced juvenile. In one jurisdiction more than half of the juveniles receiving custodial sentences are sentenced to three months or less and less than 3 per cent receive sentences of one year or more because experience has convinced the juvenile authorities that sentences of more than one year are counter-productive for the rehabilitation of the juvenile in the vast majority of cases. Yet in other countries legislation provides sentences of 15, 20, 30 or even 50 years for juvenile offenders. While it would be futile to seek a clearly defined, universally applicable limit concerning the length of sentences which can be imposed on juvenile offenders without infringing the fundamental rights of the child, there can be little doubt that sentences as long as these can hardly be considered proportionate "to the

circumstances and the needs of the juvenile as well as the needs of the society", or compatible with the principle that the deprivation of liberty be for the "shortest possible (or 'appropriate') period of time".

51. In some countries such lengthy sentences are applicable to juvenile offenders in general. While States have a margin of appreciation in determining what sentences are appropriate for juvenile offenders, the basic right of every child to "such measures as his age and status require" implies that the length of such sentences must be calculated on the basis of the needs and characteristics of juvenile offenders. Legislation which provides that the sentences applicable to juveniles are to be determined by reference to the sentence applicable to an adult convicted of the same offence (e.g. one half or two thirds of the adult sentence) do not meet this basic requirement.

52. In other countries such sentences are not applicable to juvenile offenders in general, but only to those tried as adults. On occasion, such legislation has been defended on the grounds that, because of the possibility of early release, the time actually spent in prison pursuant to such sentences is much less than the maximum would suggest. Information as to how such legislation is applied in practice (e.g. data on the age of juveniles sentenced as adults, whether the decision is based on the circumstances of the individual case or the nature of the crime charged, the type of offence and other circumstances which cause juveniles to be tried as adults, how frequently this occurs and the length of time actually served) would of course be useful in evaluating its compatibility with international standards.

53. Nevertheless, even assuming that few juveniles are punished as severely as the law allows, legislation of this kind creates a real and substantial danger for the rights of the juvenile offenders. A recent decision of the Inter-American Commission of Human Rights concerning a 17-year-old convicted of homicide illustrates this: the offender was sentenced as an adult despite having borderline mental retardation and expert testimony that at the time of the offence he had a mental age of between 9 and 12 years and had acted under the influence of an adult. This case, in which the juvenile was executed, provides a useful reminder of the dangers of legislation which allows severe sentences on the theory that the sentences applied in practice will be milder, or that the maximum penalty will be used rarely and judiciously. When the crime is one which shocks public sensibility, it is often difficult for the sentencing court to resist the temptation, or pressure, to respond primarily to the offence rather than the offender.

D. The detention of juveniles with adults

54. The status and situation of international standards prohibiting the detention of juveniles with adults is paradoxical in some respects. Of the four principles concerning the rights of juveniles mentioned in resolution 1989/32 of the Sub-Commission, it is by far the clearest and most unambiguous. The Human Rights Committee, in its comment on article 10 of the International Covenant on Civil and Political Rights, stressed the categorical nature of this prohibition stating: "It is the Committee's opinion that, as is clear from the text of the Covenant, deviation from the State's Parties obligations under sub-paragraph 2(b) cannot be justified by any consideration

whatsoever." Yet more recent instruments concerning the rights of the child, in particular the Convention on the Rights of the Child and the United Nations Rules for the Protection of Juveniles Deprived of Liberty, recognize this prohibition in qualified terms (art. 37(c) and rule 29). Of these four international standards the prohibition of the detention of juveniles with adults is the most widely recognized in national law, yet there are more reservations to the corresponding provision of the International Covenant on Civil and Political Rights than any other, many of them by countries whose treatment of juvenile offenders is reputed to be advanced. And of the four areas covered by the mandate of the Special Rapporteur, it is possibly the one where the gap between legislation and practice is widest.

55. Some countries routinely detain juveniles in separate sections of adult facilities, apparently in the belief that this practice satisfies the requirement that juveniles be separated from adults. However, the International Covenant requires not merely that juveniles be separated from adults, but that they be "segregated from adults and provided treatment appropriate to their age and legal status". (This provision refers specifically to convicted juvenile offenders; a separate paragraph requiring the separation of juveniles from adults during pre-trial detention emphasizes that detention should be ended as "speedily as possible".) The reasons underlying the rule that juvenile prisoners should be separated from adult prisoners are thus twofold: to protect the juveniles against moral and physical danger, and to ensure that juveniles are detained in conditions to meet their needs.

56. The United Nations Rules for the Protection of Juveniles Deprived of Liberty provide comprehensive guidelines as to what these conditions should be. Even where financial limitations create difficulties in achieving full compliance with the standards contained in the rules, it is essential not merely to ensure physical separation of juveniles and adults, but to ensure that those juveniles who cannot be released are detained in a facility designed to meet their needs, not those of adults. Aspects such as staffing, activities, discipline, visits, privacy and separation of juveniles by age, sex and behaviour are at least as important as the physical infrastructure. The Rules for the Protection of Juveniles Deprived of Liberty confirm that the guidelines set forth therein are applicable to any form of detention, whether prior to adjudication or not (rules 11.b and 18).

57. In some cases juveniles are detained in ordinary jails or police detention facilities for very brief periods of one day or less immediately after arrest. Such limited periods of detention in facilities not designed for juveniles may be acceptable, provided that juveniles are protected against contact with adult prisoners. In general, however, detention of juveniles in adult facilities where they are not provided with an environment and régime especially designed to meet their needs, cannot be considered sufficient to meet international standards, even if the juveniles are effectively "segregated" from adults.

58. Some States subscribe to the principle that juveniles should be separated from adults, but lack of appropriate facilities or similar obstacles have led to widespread violations of this principle. In such cases, the international community should endeavour to provide appropriate assistance.

59. Other States indicate that they do not consider separation of juveniles and adult prisoners to be in the best interest of the child, either in specific exceptional circumstances or in general. One of the most frequently mentioned circumstances is conflict with the principle that juveniles should not be detained at such distance from home as to create obstacles for frequent contact between a detainee and his or her family. With increased reliance on delinquency prevention, diversion and use of non-custodial dispositions, in theory one reaches a point where the number of juveniles in custody diminishes to the point that there would be too few even for small, decentralized custodial facilities of the kind foreseen by the United Nations Rules for the Protection of Juveniles Deprived of Liberty (rule 30). In such circumstances, detention of juveniles in multi-purpose facilities might be preferable to removing juveniles to centralized facilities where they would be separated from their community and family, but this would depend on a number of other factors, including the criteria used for allocating juvenile and adult prisoners to such facilities, and questions concerning the physical design of such facilities, the régime, programme and staffing. This is one aspect of the human rights of detained juveniles which could usefully be studied in more detail by the Special Rapporteur.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

60. Violations of the basic human rights of detained juveniles are distressingly common in many countries throughout the world.

61. Given the greater vulnerability of juveniles to various forms of abuse, neglect and injustice, and the profound and indelible impact of such traumatic experiences on personalities still not fully developed, the destructive consequences of such violations for the juveniles concerned, and consequently for the society itself, are serious and far-reaching.

62. The main causes of such violations include:

(a) Lack of adequate delinquency-prevention strategies, policies and programmes, in particular the lack of social policies and programmes designed to provide aid and support to families affected by situations which put children at risk of delinquency;

(b) Antiquated legislation which does not reflect modern concepts of the rights of the child;

(c) Facilities and infrastructures which are insufficient to meet the challenge of juveniles in conflict with the law and juveniles in situations of risk in the society in question, or which are in poor repair or were designed on the basis of concepts and policies incompatible with the rights of the child;

(d) Ignorance of the international and national standards concerning the legal rights of children, as well as lack of training concerning their psycho-social needs and characteristics, in particular on the part of judges, police and correctional personnel;

(e) Lack of legal assistance for children, including free legal assistance for those in need;

(f) Lack of commitment on the part of some authorities and sectors of public opinion to respecting the basic human rights of all children, including those from economically disadvantaged classes, socially or racially discriminated-against groups and juvenile offenders.

63. Although major advances have been made since 1985 in the establishment of international standards and guidelines concerning delinquency prevention, the rights of juveniles in conflict with the law and rights of juveniles deprived of liberty, effective promotion of compliance with these standards requires a gradual process of analysis in particular those containing expressions like "last resort", "exceptional" and "shortest possible period".

64. Valuable efforts have been made by the international community in promoting awareness of international standards concerning juvenile justice and providing technical assistance in the area of juvenile justice and rehabilitation, in particular by some UNICEF offices and by the United Nations Institute for the Prevention of Crime and Treatment of Offenders, often in cooperation with NGOs, but such efforts are still too limited in scope given the magnitude and gravity of the existing problems.

B. Recommendations

65. All Governments not yet having done so should be urged to review their legislation and practices with a view to ensuring compatibility with recently adopted international standards concerning the rights of children and juvenile justice, including The Beijing Rules, the Riyadh Guidelines, the United Nations Rules for the Protection of Juveniles Deprived of Liberty and, as appropriate, the Convention on the Rights of the Child.

66. Such review should be carried out with the active participation of concerned community, professional and human rights organizations of the countries concerned.

67. UNICEF, the United Nations Institutes for the prevention of crime and treatment of offenders, the Crime Prevention and Criminal Justice Branch, and the United Nations Centre for Human Rights, in particular the Advisory Services Programme, should "take the necessary measures to ensure a concerted and sustained effort to promote international standards concerning juvenile justice on the national and regional level, jointly and in cooperation with Governments, NGOs and bilateral aid agencies", as indicated in General Assembly resolution 45/113 of 14 December 1990. In particular, an international meeting of experts on the human rights of detained juveniles with joint sponsorship by the Centre for Human Rights, UNICEF, the Crime Prevention and Criminal Justice Branch should be organized during 1992 in order to provide input into the work of the Special Rapporteur.

68. The Special Rapporteur should prepare a revised report for 1993, taking into account additional information received from States and NGOs since the preparation of this preliminary report, as well as such additional information or clarifications as may be received or as the Special Rapporteur may request from States, UNICEF or other United Nations bodies and NGOs, and the comments of members of the Sub-Commission and observers on this preliminary report.

69. The Secretary-General should provide the Special Rapporteur with necessary assistance in the preparation of such a revised report, as well as a progress report to be presented to the Sub-Commission in 1992.